where a woman paid the defendant to procure a husband for her, she was allowed to recover the money so paid, since the defendant had not performed.[6] This, too, seems to be in accordance with the policy of the law to prevent, not the formation, but the performance of such contracts. Is a recovery allowable in a possible third class of illegal contracts, *viz.*, those in which the plaintiff agrees to do the illegal act, and, disaffirming after he has partially performed, seeks to recover for the partial performance? It was held in a recent Massachusetts case that he can recover so long as the part performance itself was not illegal. *Eastern Expanded Metal Co.* v. *Webb Granite and Construction Co.*, 81 N. E. 251. This seems correct, for as far as the illegal act is concerned the contract was still executory; and a recovery before the harm was done would tend to prevent the doing of it. Therefore the rule may now, perhaps, be broadly stated, covering all these classes of cases, that a recovery is allowed in quasi-contract for benefits furnished under a contract illegal but not *malum in se*, so long as no part of the illegal purpose has been consummated.

THE EXERCISE OF NON-JUDICIAL FUNCTIONS BY THE JUDICIARY. — In the European states the theory of separation of powers has been accepted as a decree that the legislative and executive branches, in the administration of public affairs, shall be free from interference by the judiciary.[1] In America, however, the separation of powers has not been taken as a limitation upon the judiciary, but rather as an elevation of it to the position of an independent department of government as supreme in its particular field as either of its co-ordinate departments in theirs.[2] If this theory of governmental organization is to be successfully executed, it is imperative that each department exercise vigilance to see that none of the functions delegated to it by the constitution are exercised by co-ordinate departments;[3] equally, it must be careful not to infringe the prerogatives of the other branches.[4] Moreover, a proper respect for its dignity as an independent, co-ordinate branch of government must compel it to decline to perform duties where its final action is to be subjected to review by another department.[5] It would seem that, with the prerogatives of each department thus guarded, the whole purpose of the separation of powers is achieved. Subject to these limitations each department should be free to perform any duties assigned to it. The practical difficulties in the operation of this scheme of government arise from the fact that all the functions of government are not capable of being readily subjected to classification as executive, legislative, or judicial. Indeed it is asserted that some of the functions of government may equally well be assigned to any one of the departments.[6] However, the tendency of the courts has been to insist that none but judicial functions may be exercised by the

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[6] Hermann *v.* Charlesworth, [1905] 2 K. B. 123. See 12 HARV. L. REV. 436.

[1] Lowell, Governments and Parties in Continental Europe, 55.

[2] See The Federalist, Number 51.

[3] See Taylor *v.* Place, 4 R. I. 324.

[4] Norwalk Street Ry. Co's Appeal, 69 Conn. 576; Shephard *v.* Wheeling, 30 W. Va. 479; Auditor *v.* Atchison, etc., R. R. Co., 6 Kan. 500.

[5] Note to Hayburn's Case, 2 Dall. (U. S.) 410. See United States *v.* Ferreira, 13 How. (U. S.) 40.

[6] Paul *v* Gloucester County, 50 N. J. L. 585. *Cf.* State *v.* Brill, 111 N. W. 639 (Minn.); Salem, etc., Corporation *v.* County of Essex, 100 Mass. 282.

judiciary.[7] Although this assertion may rest in part on a theory that the constitution has granted to the judiciary only judicial powers,[8] it seems generally due to the repetition of a dictum by federal judges on their refusal to render a judgment which would be subject to revision by the executive department.[9] If it is proper for the judiciary to decline to perform any but judicial functions, it must also be proper for the executive to decline to perform aught but executive functions, and for the legislature to refuse to do anything not in its essence legislative. And consequently, if it is true that some functions of government do not properly fall within any particular department, either the constitutional machinery is hopelessly inadequate or this theory of limitation of departmental activity must fall.

It is inconceivable that the introduction into our constitutions of the theory of the separation of powers makes it possible that any function of government must remain unexercised because of difficulty in ascertaining to which department it properly belongs. Certainly the judiciary cannot, with propriety, decline to perform a duty attempted to be imposed upon it, unless the department to which that duty belongs is definitely ascertained to be one other than the judicial.[10] The Appellate Division of the Supreme Court of New York has recently sustained the constitutionality of a statute which imposed on the courts the duty of rendering decisions on disputed election ballots, counting all the ballots cast, and issuing an order which should supersede the regular election returns. *Metz* v. *Maddox*, 105 N. Y. Supp. 702. Although this statute imposes duties which differ in many respects from those ordinarily performed by courts, it does not seem possible to attribute those duties with certainty to either the executive or the legislative departments. It is therefore conceived that the true theory of the separation of powers supports the assumption of this burden by the judiciary.[11]

NATURE OF THE INTEREST CREATED BY AGREEMENTS RESTRICTING THE USE OF REALTY. — It is admittedly law that an agreement restricting the use of land is enforceable in equity. But the true nature of the right acquired is as yet unsettled. It has been likened to a combination of a specifically enforceable contract and a constructive trust,[1] and compared with a warranty of title [2] and with a negative easement. It has many points of resemblance to this last, though not rising to the dignity of a true legal easement. In neither case has the owner of the dominant estate any right to do an act on the servient; and in both the right should properly arise by covenant and not by grant.[3] It has been argued that a right of property is destroyed by a restrictive agreement and belongs to no one; but this is no more true than in the case of a negative easement. If there is an agreement not to build,

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[7] In the Matter of the Application of the Senate, 10 Minn. 78.

[8] The Constitution of the State of New York does not expressly confide the judicial power to the courts.

[9] Note to Hayburn's Case, *supra*.

[10] State *v.* Bates, 96 Minn. 110.

[11] *Cf.* Citizens Bank *v.* Town of Greenough, 173 N. Y. 215; Forsythe *v.* City of Hammond, 68 Fed. 774; Robinson *v.* Kerrigan, 90 Pac. 129 (Cal.); Somerset *v.* Hunterdon, 52 N. J. L. 512.

[1] See 5 HARV. L. REV. 274.

[2] See 17 HARV. L. REV. 174.

[3] See Fry, J. in Dalton *v.* Angus, 6 App. Cas. 740, 771.